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In the Supreme Court of the United States

OCTOBER TERM, 1980

FEDERAL BUREAU OF INVESTIGATION AND THE UNITED STATES DEPARTMENT OF JUSTICE,
PETITIONERS

v.

HOWARD S. ABRAMSON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether information contained in records compiled for law enforcement purposes and privileged from disclosure under Exemption 7(C) of the Freedom of Information Act loses that exempt status when it is incorporated into records compiled for purposes other than law enforcement.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Federal Bureau of Investigation and the United States Department of Justice, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-22a) is not yet reported. The orders of the district court (App. D, *infra*, 26a-35a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 1980, and a petition for rehearing was denied on December 19, 1980 (App. B, *infra*, 23a). On March 13, 1981, the Chief Justice extended

the time within which to file a petition for a writ of certiorari to and including April 17, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

1. Subsection (a)(4)(B) of the Freedom of Information Act, 5 U.S.C. 552(a)(4)(B), provides:

> On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

2. Subsection (b)(7) of the Freedom of Information Act, 5 U.S.C. 552(b)(7), provides:

> (b) This section does not apply to matters that are—
>
> * * * * *
>
> (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforce-

> ment authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel * * *.

3. The unnumbered provision following Subsection (b)(9) of the Freedom of Information Act, 5 U.S.C. 552(b)(9), provides:

> Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

STATEMENT

1. On June 23, 1976, respondent Howard S. Abramson filed a request pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. 552, seeking the following documents from the Federal Bureau of Investigation (App. A, *infra*, 4a-5a):

> —Copies of any and all information contained in your agency's files showing or indicating the transmittal of any documents or information from the FBI to the White House, or any White House aides, for the years 1969 and 1970, concerning the following individuals: Lowell P. Weicker, Jr.; Thomas J. Meskill; Joseph Duffey; Thomas J. Dodd; Alphonsus J. Donahue; John Lupton; Wallace C. Barnes; and Emilio Q. Daddario;
>
> —Copies of any and all information so transmitted.
>
> —An uncensored copy of the Oct. 6, 1969, letter from J. Edgar Hoover to John D. Ehrlichman by

which Mr. Hoover transmits "memoranda" on several individuals to Mr. Ehrlichman.

—A copy of the original request letter from Mr. Ehrlichman to Mr. Hoover for that data.

—Copies of all data so transmitted by the Oct. 6, 1969, letter from Mr. Hoover to Mr. Ehrlichman.

—A copy of the receipt signed by the recipient at the White House of the Oct. 6, 1969, letter.

This request was denied on the grounds that, absent disclosure authorization from the individuals named in the request, the information came within Exemptions 6 and 7(C) of the FOIA, 5 U.S.C. 552(b)(6) and (b)(7)(C), protecting "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" and "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would * * * (C) constitute an unwarranted invasion of personal privacy" (App. A, *infra*, 5a). On August 3, 1976, Abramson filed a new and broader request that was couched in more general terms and did not include the names of specific individuals. This request was denied on the grounds that it did not reasonably describe the records sought (*id.* at 5a-6a).

On December 20, 1977, after exhausting his administrative appeals, Abramson brought this action in the United States District Court for the District of Columbia to enjoin the FBI from withholding the requested records (App. A, *infra*, 7a). The government's answer denied that Abramson was entitled to any relief, but, while the suit was pending, the FBI reprocessed Abramson's request and provided more than 80 pages of material, with deletions of

information that the government asserted came within Exemptions 1, 7(C), and 7(D) of the Act, 5 U.S.C. 552 (b)(1), (b)(7)(C), and (b)(7)(D), (*ibid*).[1] Those pages comprised four groups of records, consisting of four separate cover letters with attached materials pertaining to individuals named in the cover letters. Each letter was from FBI Director J. Edgar Hoover to John D. Ehrlichman, an aide to President Richard M. Nixon, and each was dated October 6, 1969 (App. A, *infra*, 9a n.12).

The four groups of records were designated "Documents 1, 2, 3, and 4" (App. A, *infra*, 9a-10a n.12). The information currently at issue concerns portions of pages within Document 3, which consists of a cover letter from Hoover to Ehrlichman listing the names of 11 individuals about whom "name check" requests had been made, summaries of FBI file information on 10 of the 11 individuals (and, in some cases, attached copies of summaries that had been provided in response to requests from earlier administrations), a copy of an article written by one of the individuals, a Vietnam Moratorium Committee flyer, and a typed list of the individuals whose names appear on the flyer (*id.* at 9a n.12). In an affidavit dated May 2, 1978, FBI Agent Jerry R. Donahoe

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[1] Exemption 1 covers properly classified national defense or foreign policy information. Exemption 7(D) covers "investigatory records compiled for law enforcement purposes * * * to the extent that the production of such records would * * * disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source * * *." These exemption claims are no longer at issue in this case (App. A, *infra*, 3a n.5).

explained (May 1978 Aff. at 5-6) that the FBI periodically received name check requests from the White House regarding persons being considered for federal appointment or persons who would be attending White House functions and for whom a security check was thus necessary. When receiving a name check request, the FBI would search its files and assemble the records it possessed on the individual and would then extract pertinent information from those records and submit a memorandum to the White House (*ibid.*). As the released portions of Document 3 indicate, the FBI would in some instances simply summarize its information in a single name check summary, but if it possessed a summary prepared in response to a previous White House request concerning an individual, it would attach that summary to the new summary (May 1978 Aff., Exh. "M").

The government filed a motion to dismiss or in the alternative for summary judgment on the basis of its exemption claims and supporting affidavits. The district court denied the motion, holding (App. E, *infra*, 32a-34a), *inter alia*, that the Exemption 7 claims had not been substantiated because the government had not shown that the documents at issue were investigatory records "compiled for law enforcement purposes." The government thereafter submitted a renewed motion for summary judgment supported by a second affidavit by Agent Donahoe, in which he traced the deleted segments of information to their origins in FBI investigatory files. According to Agent Donahoe's second affidavit, virtually all the deleted segments were taken from records compiled either as part of a criminal investigation or in response to an inquiry for information concerning an individual under consideration for a government ap-

pointment (C.A. App. 29-30).[2] The affidavit did not give the reasons the White House had requested information on the 11 individuals described in the Document 3 summaries, but it again explained generally the FBI's statutory responsibility for providing name check information to aid in the determination of the suitability of candidates for federal office and in assuring the security of the President and of foreign visitors to the White House (*id.* at 27-29).

Based on the Donahoe affidavits, the government claimed that the deletions from Document 3 were exempt from disclosure under Exemption 7(C) of the FOIA. In arguing that the threshold showing of "law enforcement purposes" had been established, the government contended that the FBI was fulfilling a law enforcement function in responding to White House name check requests. The government also contended that, in any event, this requirement was met by the affidavit tracing the deleted segments to their origin in records unquestionably compiled for law enforcement purposes.

The district court rejected the government's argument that, in responding to the 1969 White House request, the FBI was generating investigatory records compiled for "law enforcement purposes" rather than for possible "political purposes" (App. D, *infra*, 26a-27a). It noted in this connection that each of the 11 individuals about whom the White House had sought information had been "prominently associated with liberal causes and/or [had] been outspoken in their opposition to the war in Indochina that was

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[2] "C.A. App." refers to the joint appendix filed in the court of appeals. A copy of that appendix is being lodged with the Clerk of the Court.

being waged by this nation at that time" (App. D, *infra*, 27a). The court observed, however, that the government had contended "that certain materials compiled for law enforcement purposes are exempt from disclosure pursuant to exemption 7(C) because disclosure would constitute an unwarranted invasion of personal privacy," and it held that the government had "validly invoked this exemption" (*id.* at 27a).

2. Respondent Abramson appealed the district court's ruling on the Exemption 7(C) claims (App. A, *infra*, 11a & n.14), and the court of appeals reversed (*id.* at 1a-22a). The government had defended the district court's order on the ground that it correctly distinguished between the compilation of summaries in response to the 1969 White House request, a request as to which the district court found no evidence of law enforcement purposes, and the original compilations of the segments of deleted privacy information, which were identified in Agent Donahoe's second affidavit as having occurred for specific law enforcement purposes. The court of appeals concluded, however, that the district court had made two inconsistent rulings: (1) that the Document 3 records were not compiled for law enforcement purposes and (2) that nevertheless information in those records was protected from disclosure by Exemption 7(C).

The court of appeals was willing to accept, for the purposes of its decision, that the government had established that the deleted information in the name check summaries "came from FBI documents that were compiled for legitimate 'law enforcement purposes' " (App. A, *infra*, 14a). Furthermore, the court of appeals did not suggest any disagreement with the district court's finding that disclosure of the information would constitute an unwarranted invasion of

personal privacy. Nonetheless, the court below held that the deleted segments were outside the protection of Exemption 7(C) because the government had failed to show that the name check summaries themselves were compiled for law enforcement purposes or that the summary pages were "duplicates of any FBI investigatory documents compiled for legitimate law enforcement purposes" (App. A, *infra*, 14a-15a). It construed "the statutory scheme of the FOIA" as indicating that "exemptions from disclosure apply only to *documents*, and not to the use of the information contained in such documents" (*id.* at 15a; emphasis in original). The court accordingly rejected what it characterized as the government's " 'pass through' theory" and held that "the recompiled summary documents have been improperly withheld" (*id.* at 18a).

The court of appeals noted, however, that records comprising Document 3 consisted of both name check summaries and "attachments" and that the district court had not, in making its threshold Exemption 7 determination respecting the purposes of the record compilation, made a separate inquiry as to the attachments (App. A, *infra*, 18a-19a). Because the court of appeals found itself "unable to determine from the evidence in this case the precise nature of the 'attachments' or the purposes for which they were originally created," it remanded the case to the district court "for a finding on the issue of whether the 'attachments' that were sent to the White House in response to its requests for 'name checks' were the *original documents* from the FBI files compiled prior to the White House requests, and whether they were originally compiled pursuant to a legitimate law enforcement investigation" (*id.* at 21a-22a; emphasis in original, footnote omitted).

The government's petition for rehearing, with suggestion for rehearing en banc, was denied, two judges dissenting (App. C, *infra*, 24a-25a).

REASONS FOR GRANTING THE PETITION

This case presents an important question concerning the scope of the protection accorded by Exemption 7 of the Freedom of Information Act, 5 U.S.C. 552(b)(7), to sensitive information collected for legitimate law enforcement purposes. In ordering disclosure of the FBI records in this case despite the district court's undisturbed finding that release would constitute an unwarranted invasion of personal privacy, the court of appeals has construed Exemption 7 in a mechanical fashion at odds with its purposes. Because the decision below has potential far-reaching consequences in regard to the receipt, compilation and dissemination of information by law enforcement agencies, and because a substantial portion of the litigation under the FOIA occurs in the District of Columbia Circuit, review by this Court is warranted.

1. The court of appeals has held that information concededly collected by an agency in the course of a legitimate law enforcement investigation and falling within one or more of the six categories that Congress recognized as deserving protection from mandatory disclosure loses that exempt status whenever it is included in a document that is created for some purpose other than law enforcement. This holding, which rests on a distinction between "documents" and "information" (App. A, *infra*, 14a-16a), undermines the purposes behind Exemption 7 of the FOIA and ignores the statute's emphasis on segregable portions of records.

a. To be sure, the FOIA applies to agency "records" that are "reasonably describe[d]" (5 U.S.C. 552(a)(3)) and empowers the district courts to order the disclosure of "records" that have been "improperly withheld" (5 U.S.C. 552(a)(4)(B)), and Exemption 7 itself refers to "investigatory records compiled for law enforcement purposes." But these references to "records" do not dictate a mindless focus on physical pieces of paper without regard to the origins of their contents or to distinctions between different portions of the contents. Indeed, the court of appeals acknowledged (App. A, *infra*, 14a-15a) that a document that is a "duplicate" of an original law enforcement record would retain its exempt status even though the original and the copy are physically distinct documents. Yet under the court's decision, even if the deleted individual segments of information in the name check summaries were derived from and were identical to segments of information in a document that the court would accept as an "investigatory record compiled for law enforcement purposes," the fact that they now appear in a different document robs them of the protections of Exemption 7 unless the second document also was compiled for law enforcement purposes. The court of appeals apparently would require disclosure of the sensitive information even if the new document contained a substantially verbatim transcription of information from the original record combined with a single new sentence, however trivial: the court's directions in connection with its remand for consideration of the "attachments" require the district court to consider whether the attached document was "a part of the FBI files prior to the White House's 'name check' requests" and whether "these original documents were sent to the White House as initially com-

piled and without *any* modification" (App. A, *infra*, 21a; emphasis added).

The court of appeals' wooden analysis suffers from the same excessive literalness that infected the court's decisions construing Exemption 7 prior to its amendment in 1974. The exemption at that time applied to "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." 5 U.S.C. (1970 ed.) 552(b)(7). In a series of cases commencing with *Weisberg* v. *United States Dep't of Justice*, 489 F.2d 1195 (D.C. Cir. 1973), cert. denied, 416 U.S. 993 (1974), the court of appeals concluded that any material that could be considered part of an investigatory file was exempt from disclosure, without regard to any legitimate reason for withholding it. As this Court noted in *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), Congress disapproved of this " 'woode[n] and mechanica[l]' approach taken by the D.C. Circuit" (437 U.S. at 230, quoting 120 Cong. Rec. 17034 (1974) (remarks of Sen. Kennedy), *reprinted in* House Comm. on Government Operations & Senate Comm. on the Judiciary, *Freedom of Information Act and Amendments of 1974 (P.L. 93-502); Source Book: Legislative History, Texts, and Other Documents* 335 (1975) (hereinafter "*1975 Sourcebook*")), and it changed the exemption to its present form in order to ensure that reviewing courts would focus on particular documents, not on the files in which they were placed, and would " 'loo[k] to the reasons' for allowing withholding of investigatory files before making their decisions." *NLRB* v. *Robbins Tire & Rubber Co.*, *supra*, 437 U.S. at 230, quoting 120 Cong. Rec. 17034 (1974) (remarks of Sen. Hart), *1975 Sourcebook* 334. The decision of the D.C. Circuit in this case, which fails to consider the differing origins of portions of the records at

issue, also is unduly inflexible and applies "the language of the Exemption too literally and without regard for its underlying purposes." *NLRB* v. *Robbins Tire & Rubber Co., supra*, 437 U.S. at 231 n.11 (characterizing Sen. Hart's concern with court interpretations of Exemption 7).[8]

Congress's obvious purpose in enacting Exemption 7(C) was to guarantee the personal privacy of individuals who are the subject of law enforcement investigations or who are mentioned in the records of those investigations. See 120 Cong. Rec. 17033-17034 (1974) (remarks of Sen. Hart), *1975 Sourcebook* 333. This purpose is seriously compromised if a transcription of that information into another document created for a purpose other than law enforcement automatically destroys the protection of the privacy clause of the exemption. Indeed, the court's construction of the statute turns Exemption 7(c) on its

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[8] In amending the FOIA in 1974, Congress was concerned with the distinction between "files" and specific material contained in files rather than the distinction between "records" and the information contained in them. This is indicated by the fact that in discussing the amendment to Exemption 7 before its enactment, the amendment's sponsor, Senator Hart, and others referred interchangeably to "documents," "records," and "information" in describing the focus of Exemption 7. See, *e.g.*, 120 Cong. Rec. 17033 (1974) (remarks of Sen. Hart), *1975 Sourcebook* 333 ("Our concern is that, under the interpretation by the courts in recent cases, the seventh exemption will deny public access to information even previously available"); 120 Cong. Rec. 17033 (1974) (remarks of Sen. Kennedy), *1975 Sourcebook* 335 (explaining that he had seen no need to amend Exemption 7 when the basic FOIA amending legislation was originally introduced because "when I introduced the legislation I believe[d] that the public was secure in its right to obtain information falling within the 'investigatory file' exception to disclosure mandated by the act").

head. In this case, for example, if the White House requested the name check summaries for improper political purposes and, as a result, personal information culled from law enforcement records was incorporated into a separate document and divulged to government officials who had no good reason to see it, it is difficult to understand why Congress would have intended that the privacy interests of the individuals in question should be further compromised by disclosure of the sensitive information to any member of the public who requests the new document in which it is transcribed. See *Irons* v. *Bell*, 596 F.2d 468, 474 (1st Cir. 1979) (construing "law enforcement purposes" broadly so as not to penalize innocent individuals with invasions of their privacy because a particular investigation exceeds permissible limits); *Kuehnert* v. *FBI*, 620 F.2d 662, 666-667 (8th Cir. 1980).[4] The court of appeals' holding also would

[4] The First Circuit in *Irons* observed (596 F.2d at 474) that "[t]he character of the materials excluded under Exemption 7 at least suggests that 'law enforcement purpose' is as much a description of the type of agency the exemption is aimed at as it is a condition on the use of the exemption by agencies having administrative as well as civil enforcement duties." The court concluded (*ibid.*) that, for this reason and for "strong policy reasons[,]" Exemption 7 should be read as extending "to all investigative files of a criminal law enforcement agency." The permissibility of withholding such materials, however, would depend upon whether they came within one of the six specific categories of information Congress deemed deserving of protection.

Whether the rationale of *Irons* might apply in this case so as to bring all of the pages of Document 3 initially within Exemption 7 without regard to the origin of their contents is not at issue here. Our argument in this Court, as in the court of appeals, extends only to those portions of the records that are traceable to records of earlier law enforcement investigations.

seemingly prevent the government from relying on Exemption 7(D) to delete the name of an informant or confidential information supplied by an informant, if the informant's name or the information he provided were transferred from a document compiled for law enforcement purposes to a different document prepared for purposes other than law enforcement. See *Irons* v. *Bell*, *supra*, 596 F.2d at 474-475; *Kuehnert* v. *FBI*, *supra*, 620 F.2d at 667-668. See also *Sands* v. *Murphy*, 633 F.2d 968 (1st Cir. 1980) (Exemption 7(D) protection not lost by virtue of fact that promise of confidentiality to an informant is made by a state agency that then transfers the information to the FBI).

It also bears emphasis that the deletions at issue here do not pose any threat to open government (see *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 17 (1974)) or frustrate the FOIA's overriding goal "to ensure an informed citizenry * * * and to hold the governors accountable to the governed." *NLRB* v. *Robbins Tire & Rubber Co.*, *supra*, 437 U.S. at 242. The items the FBI seeks to withhold do not conceal the fact that a presidential aide requested information on 11 specified individuals or that the FBI responded to that request in the manner in which it customarily complied with White House "name check" requests. The withholding merely protects the personal privacy interest of these individuals and of third parties referred to in their files. Compare *Columbia Packing Co.* v. *United States Dep't of Agriculture*, 563 F.2d 495, 499-500 (1st Cir. 1977).[5] Because the sensitive privacy information

[5] The court of appeals' analysis cannot be justified as an interpretation of the FOIA sensitive to this distinction, because it would permit withholding of large segments of *origi-*

was derived from law enforcement records, Congress intended to exempt this information from mandatory disclosure.

b. The court of appeals' approach is also inconsistent with the requirement in 5 U.S.C. 552(b) that "[a]ny reasonably segregable portion of a record" be "provided to any person requesting such record after deletion of the portions which are exempt under" subsection (b). This provision, which applies to all exemptions, was added by Congress in 1974 on the implicit assumption that an agency record is not necessarily a seamless web of information that is either totally exempt or totally non-exempt. A court must differentiate among the record's various parts. As Senator Kennedy, a sponsor of the 1974 FOIA amendments explained, "if exempt portions of the requested records or files are severable, they should be severed—or deleted, as the case may be—and the nonexempt portions disclosed." 120 Cong. Rec. 17017 (1974), *1975 Sourcebook* 288. That is precisely what the district court permitted here.

2. The court of appeals' construction of Exemption 7 in this case is likely to have substantial harmful consequences. The rationale of the court's decision clearly applies to investigatory file information coming within any of the six categories listed in Exemption 7, and it also logically applies to all such information in documents prepared for any purpose, whether or not legitimate, that does not qualify as law enforcement.

A few examples illustrate the seriousness of the potential problem. We are advised, for instance, that

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nal law enforcement files transmitted to other persons or agencies without regard to the purpose for the transmittal. See note 6, *infra*.

the FBI on occasion transmits information from its investigatory records to the State Department, where the information may be included in documents prepared by the Visa Office for use in making decisions on visa applications or in documents sent to United States embassies abroad when foreign governments seek assurances that they are dealing with reputable persons in business negotiations. In addition, the FBI sometimes receives requests from congressional committees investigating criminal activities with a view to enacting new legislation, and it responds with documents summarizing file information rather than with boxes of raw files. Other law enforcement agencies provide similar assistance. In each of these examples, the new documents, although prepared for legitimate purposes, presumably would not qualify as "investigatory records prepared for law enforcement purposes" under the D.C. Circuit's reading of the FOIA, and accordingly information exempt under Exemption 7 at its origin would have to be disclosed.[6]

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[6] Under the court of appeals' reading of Exemption 7, of course, the FBI may avoid disclosure simply by transmitting a copy of its *original* investigative record rather than by incorporating portions of the record into a new document. Relying on *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132 (1975), the court below observed that, "[w]hile the use to which the information contained in records exempt under (b)(7) may change, the nature of the document itself does not" (App. A, *infra*, 20a). But this "remedy"—attaching complete, raw investigative files rather than merely quoting, paraphrasing or summarizing portions of the file in another document—only emphasizes the court's excessively literal interpretation of the exemption. Congress cannot have intended agencies to engage in such burdensome and meaningless devices in order to retain the exempt status of sensitive materials.

The court of appeals' decision will prove particularly burdensome for the FBI and other federal agencies because every withholding of agency records under the FOIA may be challenged in the District of Columbia Circuit. See 5 U.S.C. 552(a)(4)(B). Indeed, current Department of Justice figures reveal that 44% of the FOIA suits brought in Fiscal Year 1980 were filed in this circuit.[7] Hence, the FBI and

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[7] The decision in this case has already been relied on by two district judges in the District of Columbia Circuit. In *Pratt* v. *Webster*, Civil Action No. 78-1688 (D.D.C. Feb. 12, 1981) (pending on government's motion for reconsideration), the district court denied the government's Exemption 7(C) and 7(D) claims with respect to information in certain documents generated in the FBI's counterintelligence program known as "COINTELPRO" without regard to whether the deleted material was taken from records compiled in connection with legitimate law enforcement investigations.

In *Playboy Enterprises, Inc.* v. *United States Dep't of Justice*, Civil Action No. 80-1172 (D.D.C. Mar. 31, 1981), the district court found (slip op. 17-18) that a report prepared by the Justice Department's Office of Professional Responsibility (OPR) for the Attorney General with respect to the activities of Gary Thomas Rowe, Jr., an FBI informant used in investigations of activities of the Ku Klux Klan, was not an "investigatory record compiled for law enforcement purposes." Relying on *Abramson*, the court explained (slip op. 18) that the report could not be considered an "extension" of the original FBI law enforcement files which the report in part summarized and that because the report failed "independently" to "qualify as an investigatory record compiled for law enforcement purposes" the government could not "rely on Exemption 7 to withhold portions of the Report to the extent that it does." The court then nonetheless upheld the government's Exemption 7(C) and 7(D) claims for certain material in the Report. We believe that the district court erred both in holding that the OPR Report did not itself qualify as an Exemption 7 investigatory record and in holding that the exempt status of the files from which the deleted materials in

other agencies with custody of documents containing law enforcement information that would have to be divulged under the decision below cannot easily afford to await a contrary decision on the issue by another circuit. In these circumstances, this Court should grant review to consider whether the court of appeals' holding that the FBI must disclose the sensitive privacy information at issue in this case is faithful to the language of Exemption 7 and the important interest it protects.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1981

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question were taken is irrelevant. It seems clear, however, that, given the district court's conclusions on these two issues, its decision to uphold the Exemptions 7(C) and 7(D) claims cannot be squared with the D.C. Circuit's holding in *Abramson*. The district court's inability to accept the logical result of *Abramson* is eloquent testimony to the fact that the court of appeals' construction of the FOIA is at odds with congressional intent.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-2500

HOWARD S. ABRAMSON, APPELLANT

v.

FEDERAL BUREAU OF INVESTIGATION, ET AL.

Appeal from the United States District Court for the District of Columbia

(D.C. Civil No. 77-2206)

Argued September 5, 1980

Decided October 24, 1980

Before: WRIGHT, *Chief Judge*, and MIKVA and EDWARDS, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* Edwards.

EDWARDS, *Circuit Judge:* This appeal raises an issue concerning the obligation of the Federal Bureau of Investigation (FBI) to furnish information pursuant to a citizen request made under the Freedom of Information Act (FOIA).[1] During the period from

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[1] 5 U.S.C. § 552 (1976).

1969 through 1974, during the incumbency of former President Nixon, the FBI transmitted documents pertaining to various public personalities to the White House; these documents were compiled by the FBI in response to requests received from the White House. Petitioner, Howard S. Abramson, initially sought to obtain these documents through a request for information, under the FOIA, which was submitted to the FBI in June of 1976. After several attempts to secure the documents from the FBI proved unsuccessful, Petitioner filed suit on December 20, 1977 in the United States District Court for the District of Columbia to compel disclosure.

During the pendency of the suit in District Court, the FBI reprocessed Abramson's request and provided him with a portion of the materials sought. However, in response to the request for the remaining unreleased documents, the FBI asserted three statutory exemptions from the disclosure requirements of the FOIA. In particular, the FBI claimed that the disputed documents were protected from disclosure under Exemptions (b)(1),[2] (b)(7)(C),[3] and (b)(7)(D).[4]

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[2] 5 U.S.C. § 552(b)(1). Exemption 1 authorizes withholding of documents that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order."

[3] 5 U.S.C. § 552(b)(7)(C). Exemption (7)(C) authorizes withholding of documents that are "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would . . . constitute an unwarranted invasion of personal privacy. . . ."

[4] 5 U.S.C. § 552(b)(7)(D). Exemption (7)(D) authorizes withholding of documents that are "investigatory records

Following several hearings before the District Court, the issues narrowed; as a consequence, the sole question remaining for resolution on this appeal is the applicability of a claimed exemption under section (b) (7) (C).[5] The documents here in question include one letter, with attachments, *see* note 12, *infra*, referred to as "name check" responses. These "name checks" are summaries of information from FBI files on certain public personalities which had been prepared pursuant to requests received from the White House. The District Court found that "there has been absolutely no showing that these particular records were compiled for law enforcement purposes," and ruled that, since "the defendants have failed to meet their burden . . . summary judgment will be granted in favor of the plaintiff on this point."[6] However, the District Court also found that the disputed documents were "exempt from disclosure pursuant to exemption (7) (C) because disclosure would constitute an unwarranted invasion of personal privacy."[7] Petitioner challenges this latter ruling denying disclosure of the requested documents.

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compiled for law enforcement purposes, but only to the extent that the production of such records would . . . disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source. . . ."

[5] Petitioner no longer challenges the FBI's claimed exemptions under § (b) (1) and § (7) (D). Petitioner's brief at 10.

[6] Petitioner's appendix (App.) at 73. These rulings appeared in an Order of the District Court which was issued on November 30, 1979. App. at 72-73.

[7] App. at 73.

Upon a careful review of the record in this case, we find that the District Court misapplied the law with respect to the applicability of Exemption (7)(C) to the "name check" summaries. We therefore reverse on this point, with an instruction that the summaries be released to Petitioner. With regard to the materials attached to the "name check" summaries, we remand for further proceedings for a determination by the District Court as to whether the attachments were "compiled for law enforcement purposes" and, if so, whether these documents are thus exempt from disclosure under section (7)(C).

I. Background

Petitioner, a professional journalist, has stated that "[t]he requests which are the subject of this lawsuit grow directly out of [his] interest in the extent to which the White House may have used the F.B.I. and its files to obtain derogatory information about political opponents and those that it perceived as enemies." App. at 11.

Petitioner first filed his FOIA request on June 23, 1976, App. 5, in a letter to Clarence M. Kelley, then the Director of the FBI. Petitioner's request sought the following documents:

> —Copies of any and all information contained in your agency's files showing or indicating the transmittal of any documents or information from the FBI to the White House, or any White House aides, for the years 1969 and 1970, concerning the following individuals: Lowell P. Weicker, Jr.; Thomas J. Meskill; Joseph Duffey; Thomas J. Dodd; Alphonsus J. Donahue; John Lupton; Wallace C. Barnes; and Emilio Q. Daddario;

—Copies of any and all information so transmitted.

—An uncensored copy of the Oct. 6, 1969, letter from J. Edgar Hoover to John D. Ehrlichman by which Mr. Hoover transmits "memoranda" on several individuals to Mr. Ehrlichman.

—A copy of the original request letter from Mr. Ehrlichman to Mr. Hoover for that data.

—Copies of all data so transmitted by the Oct. 6, 1969, letter from Mr. Hoover to Mr. Ehrlichman.

—A copy of the receipt signed by the recipient at the White House of the Oct. 6, 1969, letter.

App. at 5.

By letter dated July 23, 1976, Kelley notified Petitioner that the Bureau would not search its files to determine whether it had the requested information until Petitioner obtained notarized authorization for the disclosure of the information from the subjects of the request. App. at 7. Kelley indicated that, without such authorization, the information would be "exempt from disclosure pursuant to Title 5, United States Code, Section 552(b)(6), which exempts information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy and/or (b)(7)(C), which exempts information the disclosure of which would constitute an unwarranted invasion of personal privacy." App. at 7.[8]

After receiving Kelley's response, Petitioner assumed that his initial "request was too specific and

[8] The FBI no longer asserts Exemption (b)(6), 5 U.S.C. § 552(b)(6), as a justification for nondisclosure. This exemption protects from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

that in its specificity it violated the privacy of others." App. at 12-13. Petitioner thereafter filed a new request on August 3, 1976, seeking the following documents:

> 1. All written requests and written records of oral or telephone requests from the White House or any person employed by the White House to the FBI for information about any person who was in 1969, 1970, 1971, 1972, 1973, or 1974 the holder of a federal elective office or a candidate for federal elective office.
>
> 2. All written replies and records of oral or telephonic replies from the FBI to the White House in response to requests described in paragraph one.
>
> 3. Any index or indices to request or replies described in paragraphs one and two.

App. at 9. On August 20, 1976, Kelley denied Abramson's second request for failure to "reasonably describe the records sought" as required by 28 C.F.R. § 16.3(b) (1979).[9]

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[9] The reference to 28 C.F.R. § 16.3(b) appears in the Department of Justice's regulations pertaining to Production or Disclosure of Material or Information under the FOIA. 28 C.F.R. § 16.1 (1979). 28 C.F.R. § 16.3(b) provides that:

> (b) *Request should reasonably describe the records sought.* A request for access to records should sufficiently identify the records requested to enable Department personnel to locate them with a reasonable amount of effort. Where possible, specific information regarding dates, titles, file designations, and other information which may help identify the records should be supplied by the requester. If the request relates to a matter in pending litigation, the court and its location should be identified.

After unsuccessfully appealing both denials within the agency, Abramson filed suit, on December 20, 1977, in the United States District Court for the District of Columbia to enjoin the FBI from withholding the records and to make the records immediately available to him. The FBI responded to Abramson's suit by denying all liability under the FOIA, as it had done throughout the administrative appeals. During the pendency of this action, the FBI reprocessed Abramson's requests and provided him with eighty-four pages of documents—some intact, and some with deletions. The Government claimed that the deleted material was protected from disclosure under Exemptions (b)(1), (b)(7)(C) and (b)(7)(D).[10]

On the Government's motion for dismissal or, alternatively, summary judgment, the District Court issued an order on January 3, 1979, requiring the Government to allow Petitioner to modify his second request to more reasonably describe the documents sought, and requiring the Government to re-evaluate the nondisclosed material claimed exempted under (b)(1) in light of Executive Order 12065, 43 Fed. Reg. 28,949 (1978).[11] App. at 18, 20. In addition, the District Court denied the Government's motion with respect to Exemptions (7)(C) and (7)(D), pending a showing that the documents for which the exemptions were claimed were compiled for law enforcement and not political purposes. App. at 18-19. The District Court noted that the only evidence before it to indicate that the records were

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[10] *See* notes 2, 3 and 4, *supra*.

[11] Executive Order 12065 superceded Executive Order 11652, as amended, 50 U.S.C. § 401 (1978), on December 1, 1978.

compiled for law enforcement purposes was the Government's assertion that:

> The documents which are at issue in this proceeding were compiled by the FBI pursuant to requests by the White House and were transmitted by the Bureau to a senior White House official, John D. Ehrlichman. Thus, the records plaintiff seeks were compiled pursuant to the investigative authority of the FBI.

App. at 18.

In its January 3, 1979 Memorandum Opinion and Order, the District Court cited *Weisberg* v. *United States Department of Justice*, 489 F.2d 1195, 1202 (D.C. Cir. 1973) (en banc), *cert. denied*, 416 U.S. 993 (1974), which held that, notwithstanding the Attorney General's designation of certain investigatory files as having been compiled for law enforcement purposes, "his *ipse dixit* does not finalize the matter, for there remains the judicial function of determining whether that classification be proper." App. at 19. The District Court Memorandum Opinion also noted that:

> The Court does not full [*sic*] understand the government's logic that because the records were compoled at the White House's request, they are "thus" investigatory. Moreover, this contention does not even address the issue whether the records were compiled for "law enforcement" rather than political purposes.

App. at 19. The District Court thus found the bald assertion of exemption by the FBI to be an insufficient basis from which to determine the proper classification of the documents. *Id.*

On September 6, 1979, the FBI submitted an affidavit to the District Court describing in detail the four documents that were processed in response to Petitioner's request, and an explanation in each instance of the justifications for nondisclosure.[12] On

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[12] The affidavit describes the four documents as follows:

A. An October 6, 1969, letter from J. Edgar Hoover to John D. Ehrlichman, marked with file number 62-5-34727, with enclosures, regarding FBI name checks on William J. Harris, J. Keith Mann, Dr. Karl Augustus Menninger, Howard Pyle and Wilbur Hughes Strickland, M.D. Also accompanying the document is a list of names reflecting the name check request from the White House. [Document No. 1.].

B. An October 6, 1969, letter from J. Edgar Hoover to John D. Ehrlichman, marked with file number 65-5-34728, with an enclosure relating to an FBI name check on Archie Floyd Weaver. Also accompanying the document is a letter dated October 2, 1969, reflecting the name check request from the White House. [Document No. 2].

C. An October 6, 1969, letter from J. Edgar Hoover to John D. Ehrlichman, marked with file number 65-5-34736, with enclosures relating to FBI name checks on Cesar Estrada Chavez, Joseph Duffey, Maurice Eisendrath, John Kenneth Galbraith, Richard N. Goodwin, Fannie Lou Hamer, Dr. Reinhold Nieburh, Paul Schrade, Adam Walinsky and Dr. George Wiley. Also among the enclosure is a copy of an article written by John Kenneth Galbraith, a Vietnam Moritorium Committee Flyer, and a typed list containing the names of certain individuals whose names appeared on the flyer. [Document No. 3].

D. An October 6, 1969, letter from J. Edgar Hoover to John D. Ehrlichman, marked with file number 62-5-34747, with enclosures relating to FBI name checks on George W. Barton and C. Monroe Shigley. Also accompanying the document is a letter dated October 3, 1969,

the basis of this affidavit, and the eighty-four pages of documents that the FBI had previously released, Petitioner submitted a modified request on September 25, 1979, seeking only the material withheld from "Document No. 3." App. 47. Document No. 3 includes a one-page memorandum, dated October 6, 1969, from J. Edgar Hoover to John D. Ehrlichman, plus approximately sixty-three pages of "name check" summaries and attachments. The "name check" summaries detail information, culled from FBI files, on eleven public personalities.[18]

On November 30, 1979, the District Court ruled on the parties' cross-motions for summary judgment with respect to the material withheld from Document No. 3. Finding once again that the FBI had failed to show that the information was compiled for law enforcement rather than political purposes, the District Court ruled that:

> The document at issue concerns information requested by and transmitted to the Nixon White House concerning eleven individuals. Each of these eleven individuals has been prominently associated with liberal causes and/or has been outspoken in their opposition to the war in Indochina that was being waged by this nation at that time.
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> The defendants contend that the White House "name check" requests qualify as records compiled for law enforcement purposes because the White House has special security and appoint-

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reflecting the name check request from the White House. [Document No. 4].

[18] See names listed in paragraph "C," note 12, *supra*. Affidavit of Special Agent Jerry R. Donahoe. App. at 21, 25-26.

> ment functions. At no point in their pleadings do the defendants relate these broad and general duties to the individuals about whom information was requested from the FBI. Thus, there has been absolutely no showing that these particular records were compiled for law enforcement purposes. Accordingly, the defendants have failed to meet their burden, and summary judgment will be granted in favor of the plaintiff on this point.

App. at 72-73. However, the District Court then went on to rule that Exemption (7)C) was validly invoked by the Government because disclosure of the withheld materials would constitute an unwarranted invasion of personal privacy. The District Court thus granted the Government's motion for summary judgment "with respect to material withheld pursuant to Exemption . . . (7) (C)." *Id.*[14]

II. Applicability of Exemption (7)(C) to the "Name Check" Summaries.

The primary issue presented here for our review is whether the District Court erred in upholding the nondisclosure of certain documents pursuant to Exemption (7) (C), when it found that the Government had failed to carry its burden of proof in demonstrating that the withheld documents were compiled for law enforcement purposes.

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[14] The District Court also granted the Government's motion for summary judgment with respect to Exemption 1, finding that the Government had properly classified certain deleted material under the national security exemption. Petitioner does not challenge this portion of the District Court order on this appeal.

Petitioner argues that the District Court's ruling on the application of Exemption (7)(C) was plainly erroneous because the FOIA clearly prohibits the withholding of documents under Exemption (7)(C) unless the documents are found to have been compiled for "law enforcement purposes."

The Government argues that the District Court correctly concluded that Exemption (7)(C) was properly invoked to justify the withholding of the documents, notwithstanding its finding that the FBI's compilation of the "name check" summaries was not done for law enforcement purposes. On this point, the Government contends that Exemption (7)(C) is applicable because the "name check" summaries were based on information contained in documents in FBI files that were originally created for law enforcement purposes. As part of its proof on this point, the Government submitted the affidavit of Special Agent Donahoe; this affidavit indicated that each individual segment of information withheld had been traced in order to verify the specific character of each segment as investigatory material obtained by the FBI in connection with a specific law enforcement purpose. App. at 29. In effect, the Government argues that the District Court's conclusion that the Government had failed to demonstrate that the "name check" responses were compiled for law enforcement purposes is not fatal to its claim of exemption under section (b)(7)(C).

The threshold inquiry regarding any document for which a section (b)(7)(C) exemption is claimed is whether such document has been shown to be an investigatory record, which was "compiled for law enforcement purposes." In the Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act, published in February of

1975 as a guideline for the implementation of the Act, a three-pronged test is set out for determining the applicability of section (b)(7)(C) to documents:

> Once it is determined that [the threshold requirements of] "investigatory record" [and] "compiled for law enforcement purposes" [have been met], *the next* question is whether release of the material would involve one of the six types of harm specified in clauses (A) through (F) of amended exemption 7.[15]

A simple reading of the applicable provisions of the FOIA plainly supports this interpretative memorandum by the Attorney General. Thus, it is axiomatic that any consideration of whether disclosure would constitute an "unwarranted invasion of personal privacy" is premature until the documents in issue have been shown by the Government to be investigatory records which were compiled for law enforcement purposes.

Moreover, the Government agency bears the *full burden of proof* in establishing that the requirements of an exemption have been met before it can withhold a requested document from disclosure. *Jordan* v. *United States Department of Justice*, 591 F.2d 753, 779 (D.C. Cir. 1978) (en banc). *See also Exxon Corp.* v. *Federal Trade Commission*, No. 79-1995, slip op. at 11 (D.C. Cir. Oct. 3, 1980). The District Court, having properly concluded that the Government failed to sustain its burden of demonstrating that the documents were compiled for law enforce-

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[15] The Attorney General's Memorandum is cited at pp. 15-16 in petitioner's brief. *See also Lesar* v. *United States Dep't of Justice*, No. 78-2305, slip op. at 27-29 (D.C. Cir. July 15, 1980).

ment purposes, erroneously extended its analysis in finding that disclosure would constitute an unwarranted invasion of personal privacy. These two rulings, when taken together, are inconsistent with the plain mandate of the FOIA. We hold that the "name check" summaries, which the District Court found were compiled solely for use by the White House for purposes having nothing whatsoever to do with "law enforcement," were improperly withheld under the FOIA.

III. The Distinction Between "Documents" and "Information"

Although the Government acknowledged that the "name check" summaries were not compiled for law enforcement purposes, the claim is made that nondisclosure was justified because

> [a]ll of the *information* withheld was *originally* obtained and compiled by the FBI in connection with either a background investigation of an individual being considered for an official appointment or else an investigation into a suspected violation of law.

Appellee's brief at 9 (emphasis added). In other words, the Government asserts, and Petitioner does not directly dispute, that the *information* used to compile the "name check" summaries came from FBI documents that were compiled for legitimate "law enforcement purposes."

Even if we accept the truth of the Government's assertion, we are still left with undisputed facts indicating that: (1) the "name check" summaries were originally developed pursuant to a request from the White House for information about certain public personalities; (2) the "name check" summaries were

not duplicates of any FBI investigatory documents that were compiled for legitimate law enforcement purposes; and (3) the documents constituting the "name check" summaries were not compiled for any legitimate law enforcement purposes.

Without passing on whether the original FBI files were compiled for legitimate law enforcement purposes, the District Court properly distinguished between the "name check" summaries and the original FBI files. It is the non-disclosure of only the "name check" summaries that is in issue in this case. It is with respect to these documents that the District Court found that the Government had failed to show a legitimate law enforcement purpose. The Government on appeal attempts to gloss over the distinction between the two sets of documents by characterizing the recompiled summaries as simply extensions of the original documents from which they derive, all bearing the same information.

However, the statutory scheme of the FOIA very clearly indicates that exemptions from disclosure apply only to *documents*, and not to the use of the information contained in such documents.[16] Thus, when information has been recompiled in a new document for a new purpose, the new document must qualify independently for any exemptions from disclosure under the FOIA.

While the Government does indeed concede that the White House "name check" requests resulted in the production of documents which were distinct from

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[16] *See Simpson* v. *Vance*, No. 79-1889, slip op. at 11-14 (D.C. Cir. September 25, 1980) (State Department Biographic Register not exempt, even though information in Register was extracted from personnel files which may have been exempt under section (b) (6).

the underlying documents already contained in the FBI files, it did not introduce any evidence to demonstrate that the responses to the White House requests were compiled for law enforcement purposes. App. at 28. Rather, the Government simply relies on its assertion that the *underlying documents* were compiled for law enforcement purposes to meet threshold requirements of the (b)(7)(C) exemption for the "name check" summaries.

A similar argument was recently considered and rejected by this court in *Lesar* v. *United States Department of Justice*, No. 78-2305 (D.C. Cir. July 15, 1980). In *Lesar*, petitioner sought the disclosure of deletions from reports released to him that had been prepared by the Civil Rights Division and a special Task Force in the Department of Justice with respect to various FBI surveillances of Dr. Martin Luther King. The Justice Department excised certain materials, pursuant to section (b)(7)(C), which consisted of "the names and other identifying information of persons involved in the King investigation, including informants and lower-level FBI personnel, as well as information of a personal nature, the disclosure of which allegedly could embarrass Dr. King's family and associates or damage their reputations." [17]

Lesar challenged the applicability of the exemption to the withheld material on the ground that the material was not "compiled for law enforcement purposes." Lesar argued that because the FBI's surveillance had degenerated into a campaign "to discredit and to neutralize Dr. King," [18] and was unrelated to

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[17] *Lesar* v. *United States Dep't of Justice*, No. 78-2305, slip op. at 26-27 (D.C. Cir. July 15, 1980).

[18] *Id.* at 8 (quoting from the *Murphy Report*, Memorandum from Robert A. Murphy, Chief of the Criminal Section

any legitimate law enforcement purposes, it did not meet the threshold requirements set forth in section 7. In rejecting Lesar's argument, this court distinguished the underlying original surveillance records, about which it entertained "serious doubts whether [they] could be construed in their entirety as 'investigatory records compiled for law enforcement purposes,'" [19] from the Justice Department's Task Force summaries, which were at issue in the *Lesar* case. The court then noted that there was no dispute as to whether the Task Force materials were compiled during the course of a legitimate law enforcement investigation—that, in fact, one of the purposes for which the Task Force had been created was to investigate alleged improprieties in the FBI surveillances of Dr. King. The court concluded that "[w]e thus resist appellant's suggestion that we somehow should 'pass through' the Task Force notes to the underlying FBI surveillance records and inquire further into the point at which the FBI's investigation of Dr. King strayed beyond its lawful scope. We hold that the documents at issue meet the threshold requirement of subsection 7." [20]

In *Lesar* the petitioner attempted to impute the legitimate purposes associated with the compilation of the underlying documents to the Task Force summaries that were derived from the underlying documents; in this case the Government seeks to impute the legitimate purposes associated with the compila-

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of the Civil Rights Division, to J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division of the Department of Justice (March 31, 1976), at 138).

[19] *Id.* at 27.

[20] *Id.* at 28-29.

tion of the underlying FBI files to the "name check" summaries that were prepared for the White House. Although this case is the reverse of *Lesar*, we are constrained here, as we were in *Lesar*, to reject the "pass through" theory. Each *document* for which a section (b)(7)(C) exemption is claimed under the FOIA must first be shown to be an "investigatory record compiled for law enforcement purposes."

We agree with the District Court that the Government has failed to demonstrate that the "name check" summaries were compiled for law enforcement purposes, and accordingly find that the recompiled summary documents have been improperly withheld.

IV. Applicability of Exemption (7)(C) to the "Attachments" to the "Name Check" Summaries

There is an additional issue in this case, which, although given only cursory treatment by the parties, warrants discussion. As noted above, Document No. 3, the focus of this litigation, is composed of a one-page letter from the FBI to John Ehrlichman. Enclosed with the letter are sixty-three pages of "name check" summary memoranda *and attachments* pertaining to ten of the eleven individuals. While Petitioner argues that *none* of the FBI's responses were prepared pursuant to legitimate law enforcement purposes, and the Government argues that even if the summaries themselves have not been shown to have been compiled for law enforcement purposes, the underlying documents from which they were compiled were clearly the product of legitimate law enforcement investigations, neither party has suggested that the two types of documents comprising Document No. 3—summaries and attachments—might be treated differently under our section (b)(7)(C) analysis. Nor did

the District Court consider the summaries and attachments separately for section (b)(7)(C) purposes when it ruled that the threshold requirements for the exemption had not been met.

In *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132 (1974),[21] the Supreme Court considered a case in which documents that are arguably exempt from disclosure under FOIA are incorporated into a non-exempt document. The non-exempt documents in the *Sears* case were Advice and Appeals Memoranda prepared by the General Counsel of the National Labor Relations Board. The incorporated documents were memoranda prepared in contemplation of the litigation, and thus were exempted as "intra-agency" memoranda under section (b)(5) of the FOIA. In holding that the exempt memoranda lost their exemption in the incorporation process, the Court suggested that the character of the memoranda had been transformed from intra-agency memoranda in contemplation of upcoming litigation to memoranda explaining a final agency action. That is, the nature of the document itself was changed with the different use to which the information contained in the document was put:

> Petitioners assert that the District Court erred in holding that documents incorporated by reference in non-exempt Advice and Appeals Memoranda lose any exemption they might previously have held as "intra-agency" memoranda. We disagree.
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> The probability that an agency employee will be inhibited from freely advising a decisionmaker for fear that his advice, *if adopted*, will be-

[21] *See also Renegotiation Bd.* v. *Grumman Aircraft Engineering Corp.*, 421 U.S. 168 (1974).

> come public is slight. First, when adopted, the reasoning becomes that of the agency and becomes *its* responsibility to defend. . . . Moreover, [there is] the public interest in knowing the reasons for a policy actually adopted by an agency. . . . Thus, we hold that, if an agency chooses *expressly* to adopt or incorporate by reference an intra-agency memorandum previously covered by Exemption 5 in what would otherwise be a final opinion, that memorandum may be withheld only on the ground that it falls within the coverage of some exemption other than Exemption 5.

Id. at 161. Thus, the previously exempt predecisional documents may lose their predecisional character and become new and different post-decisional documents by their incorporation into a final agency opinion. *See Coastal States Gas Corp.* v. *Department of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980); *Bristol-Myers* v. *Federal Trade Commission*, 598 F.2d 18, 24-29 (D.C. Cir. 1978); *Niemeier* v. *Watergate Special Prosecution Force*, 565 F.2d 967 (7th Cir. 1977).

Yet, it does not follow that the "attachment" documents in the instant case, which may have been originally exempt under section 7, lost their exempt status when they were attached to the "name check" summaries. While the use to which the information contained in records exempt under section (b)(7) may change, the nature of the document itself does not. The Court in *NLRB* v. *Sears, Roebuck* recognized this difference, and held that documents exempt under section (b)(7) do not lose their exemption in the incorporation process once the exemption has attached:

> Finally, the General Counsel claims that the documents, incorporated by reference in Advice and Appeals Memoranda, which were previously pro-

> tected by Exemption 7, should not lose their exempt status by reason of incorporation. . . . [W]e think the argument is sound. The reasons underlying Congress' decision to protect 'investigatory files' . . . are as applicable to a document referred to in an Advice or Appeals Memorandum as they are to a document which is not. Therefore, a document protected by Exemption 7 does not become disclosable solely because it is referred to in a 'final opinion.'

Id. at 165-66. Moreover, we believe that even if all of the information contained in a document that is exempt under section (b)(7) becomes released through some other communication, the document itself could retain its exemption.

While we are satisfied that the "name check" summaries were not compiled for legitimate law enforcement purposes, we are less sure of the "attachments." We are unable to determine from the evidence in this case the precise nature of the "attachments" or the purposes for which they were originally created. If it is found that the "attachments" documents were already in existence and a part of the FBI files prior to the White House's "name check" requests, and that these original documents were sent to the White House as initially compiled and without any modification, then a determination would have to be made as to whether these documents meet the threshold requirements of section (b)(7).

Accordingly, we remand to the District Court for a finding on the issue of whether the "attachments" that were sent to the White House in response to its requests for "name checks" were the *original documents* from the FBI files compiled prior to the White

House requests, and whether they were originally compiled pursuant to a legitimate law enforcement investigation.[22] Should the District Court on remand find that the "attachment" documents are in fact investigatory records which were compiled for law enforcement purposes, then a determination must be made as to whether the attachments are exempt from disclosure under section (b)(7)(C).

On remand, it may be appropriate for the District Court to "examine the contents of [the attachments] *in camera* to determine whether such records or any part thereof shall be withheld" under section (b)(7)(C).[23] Such *in camera* inspection should serve to avoid any further disputes or delays in this litigation.

V. Conclusion

The judgment of the District Court is reversed as to the FBI "name check" summaries. The District Court is hereby instructed to require appellee to release all of the "name check" summaries heretofore withheld pursuant to a claimed exemption under section (b)(7)(C) of the FOIA.

As to the "attachment" documents, the case is remanded to the District Court for further proceedings consistent with this opinion.

So ordered.

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[22] *See Rural Housing Alliance* v. *United States Dep't of Agriculture*, 498 F.2d 73, 80, 82 (D.C. Cir. 1974).

[23] *See* 5 U.S.C. § 552(a)(4)(B), allowing for *in camera* inspection under the FOIA.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1980

Civil Action No. 77-2206

No. 79-2500

HOWARD S. ABRAMSON, APPELLANT

v.

FEDERAL BUREAU OF INVESTIGATION, ET AL.

Filed Dec. 19, 1980

Argued September 5, 1980

Before: Wright, Chief Judge, Mikva and Edwards, Circuit Judges

ORDER

On consideration of appellees' petition for rehearing, filed December 8, 1980, it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER,
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER,
Chief Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1980

Civil Action No. 77-2206

No. 79-2500

HOWARD S. ABRAMSON, APPELLANT

v.

FEDERAL BUREAU OF INVESTIGATION, ET AL.

Argued September 5, 1980

Filed Dec. 19, 1980

Before: Wright, Chief Judge, McGowan, Tamm, Robinson, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, Circuit Judges

ORDER

Appellees' suggestion for rehearing *en banc* has been circulated to the full Court. A majority of the Court not being in favor of rehearing this matter *en banc*, it is

ORDERED by the Court, *en banc* that the aforesaid suggestion is denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER,
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER,
Chief Deputy Clerk

Circuit Judges MacKinnon and Robb would rehear this matter *en banc.*

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-2206

HOWARD S. ABRAMSON, PLAINTIFF

v.

FEDERAL BUREAU OF INVESTIGATION, ET AL.,
DEFENDANTS

Filed Nov. 30, 1979

ORDER

This action is before the Court on the defendants' renewed motion for summary judgment and the plaintiff's motion for partial summary judgment, an *in camera* inspection and interim relief. The plaintiff seeks records held by the Department of Justice pursuant to the Freedom of Information Act, 5 U.S.C. § 552(b).

The major issue concerns material collected by the Federal Bureau of Investigation and forwarded to the White House pursuant to White House "name check" requests. The defendants claim that this information is exempt from disclosure pursuant to 5 U.S.C. § 552(b)(7) as investigatory records compiled for law enforcement purposes. On January 3, 1979, the Court denied the defendants' motion to dismiss or in the alternative for summary judgment on this exact issue on the ground that the agency had failed to show that the information was compiled for

law enforcement rather than political purposes. The Court finds that the defendants' renewed motion suffers from the same flaw.

The document at issue concerns information requested by and transmitted to the Nixon White House concerning eleven individuals. Each of these eleven individuals has been prominently associated with liberal causes and/or has been outspoken in their opposition to the war in Indochina that was being waged by this nation at that time. *See* plaintiff's exhibit III.

The defendants contend that the White House "name check" requests qualify as records compiled for law enforcement purposes because the White House has special security and appointment functions. At no point in their pleadings do the defendants relate these broad and general duties to the individuals about whom information was requested from the FBI. Thus, there has been absolutely no showing that these particular records were compiled for law enforcement purposes. Accordingly, the defendants have failed to meet their burden, and summary judgment will be granted in favor of the plaintiff on this point.

The defendants have also withheld some material on the basis of exemption one of the Freedom of Information Act, 5 U.S.C. § 552(b)(1). The Court finds that the defendants have properly classified such material under the national security exemption.

Finally, the defendants contend that certain materials compiled for law enforcement purposes are exempt from disclosure pursuant to exemption (7)(C) because disclosure would constitute an unwarranted invasion of personal privacy. The Court finds that the defendants have validly invoked this exemption.

Accordingly, it is, by the Court, this 30th day of November, 1979,

ORDERED, that the motion of the defendants for summary judgment be, and the same hereby is, granted with respect to material withheld pursuant to exemptions (1) and (7)(C) in that there are no issues of material fact genuinely in dispute; and in all other respect said motion is denied; and it is

FURTHER ORDERED, that the motion of the plaintiff for partial summary judgment be, and the same hereby is, granted in that there are no issues of material fact genuinely in dispute; and it is

FURTHER ORDERED, that the plaintiff's motion for, interim relief be, and the same hereby is, denied as premature.

/s/ Charles R. Richey
CHARLES R. RICHEY
United States District Judge

APPENDIX E

UNITED STATEST DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 77-2206

HOWARD S. ABRAMSON, PLAINTIFF,

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
DEFENDANTS.

MEMORANDUM OPINION AND ORDER
OF UNITED STATES DISTRICT JUDGE
CHARLES R. RICHEY

This is an action brought by the plaintiff Howard S. Abramson, a full-time writer of newspaper and magazine articles and books, under the Freedom of Information Act [hereinafter, "FOIA"], 5 U.S.C. § 552 (1976), to enjoin the government from withholding records and to order the government to make the records immediately available to plaintiff. Currently before the Court is the government's motion to dismiss, or, in the alternative, for summary judgment.

On June 23, 1976, plaintiff filed a request with the Federal Bureau of Investigation [hereinafter, "FBI"] under FOIA for:

—Copies of any and all information contained in your agency's files showing or indicating the transmittal of any documents or information from the FBI to the White House, or any White

House aides, for the years 1969 and 1970, concerning the following individuals: Lowell P. Weicker, Jr.; Thomas J. Meskill; Joseph Duffey; Thomas J. Dodd; Alphonsus J. Donohue; John Lupton; Wallace C. Barnes; and Emilio Q. Daddario.

—Copies of any and all information so transmitted.

—An uncensored copy of the Oct. 6, 1969, letter from J. Edgar Hoover to John D. Ehrlichman by which Mr. Hoover transmits "memoranda" on several individuals to Mr. Ehrlichman.

—A copy of the original request letter from Mr. Ehrlichman to Mr. Hoover for that data.

—Copies of all data so transmitted by the Oct. 6, 1969, letter from Mr. Hoover to Mr. Ehrlichman.

—A copy of the receipt signed by the recipient at the White House of the Oct. 6, 1969, letter.

In a letter dated July 23, 1976, Clarence Kelley, then Director of the FBI, requested that plaintiff obtain notarized authorization from the subjects of the request, and that barring such authorizations, the request was denied under 5 U.S.C. § 552(b)(6) and/or (b)(7)(C).

On August 3, 1976, the plaintiff made a second request:

1) All written requests and written records of oral or telephone requests from the White House or any person employed by the White House to the FBI for information about any person who was in 1969, 1970, 1971, 1972, 1973, or 1974 the holder of a federal elective office or a candidate for federal elective office.

2) All written replies and records of oral or telephonic replies from the FBI to the White House in response to requests described in paragraphy (*sic*) one.

3) All index or indices to requests or replies described in paragraphs one and two.

In a letter dated August 20, 1976, Clarence Kelley denied the plaintiff's second request contending that the request did not reasonably describe the records sought. After unsuccessful appeals within the agency, the plaintiff brought this action. Initially, the government filed an answer which categorically denied liability under the FOIA. However, during the pendency of this action, the government reprocessed plaintiff's request and provided plaintiff with a substantial number of documents—some intact, some with deletions.

I. *Material Withheld Pursuant To Exemption 1*

One of the documents released by the government has portions deleted pursuant to exemption 1, 5 U.S.C. § 552(b)(1), which provides that agencies may withhold matters that are:

> "(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order."

According to the government, the national security deletions were classified as "secret" under Executive order 11652, as amended, 50 U.S.C. § 401 (1978). However, on June 28, 1978, President Carter promulgated Executive Order 12065, 43 Fed. Reg. 28949

et seq. By its terms, Executive order 12065 became effective on December 1, 1978, and supercedes Executive order 11652. The affidavit filed by the government in support of its exemption 1 claim does not address the new Executive order. Therefore, the Court finds that the government must reevaluate the nondisclosed material with respect to the Executive order currently in force and will deny defendants' motion as to material withheld pursuant to exemption 1 at this time.

II. *Material Withheld Pursuant To Exemption 7*

A. *Exemption 7(C)*

Four of the documents released by the government have portions deleted pursuant to exemption 7(C), 5 U.S.C. § 552(b)(7)(C), which provides that agencies may withhold matters that are "investigatory documents compiled for law enforcement purposes, but only to the extent that the production of such records would . . . (C) constitute an unwarranted invasion of personal privacy." The Court must deny the government's motion at this time with respect to material withheld under this exemption because the government has failed to establish that the threshold requirement of exemption 7(C), that the records withheld be "investigatory documents compiled for law enforcement purposes." The only evidence before the Court indicating that the records were compiled for law enforcement purposes is the assertion by the government that:

> The documents which are at issue in this proceeding were compiled by the FBI pursuant to requests by the White House and were transmitted by the Bureau to a senior White House

> official, John D. Ehrlichman. Thus, the records plaintiff seeks were compiled pursuant to the investigative authority of the FBI.

Motion to Dismiss, or in the Alternative, for Summary Judgment, at 9-10 (May 2, 1978). The Court does not fully understand the government's logic that because the records were compiled at the White House's request, they are "thus" investigatory. Moreover, this contention does not even address the issue whether the records were compiled for "law enforcement" rather than political purposes. The government's contentions in this case were somewhat anticipated by the U.S. Court of Appeals for the District of Columbia in *Weisberg* v. *U.S. Department of Justice*, 489 F.2d 1195, 1202 (D.C. Cir. 1973) (en banc). In *Weisberg*, the court stated:

> Granted that the Attorney General may designate certain investigatory files as having been compiled for law enforcement purposes, his *ipse dixit* does not finalize the matter, for there remains the judicial function of determining whether that classification be proper. Where the district court can conclude that the Attorney General's designation and classification are correct, the Freedom of Information Act requires no more.

Id. at 1202. There are insufficient facts currently before the Court to enable it to decide whether the records were compiled for investigatory purposes rather than for any other purpose. Therefore, the Court will deny the government's motion with respect to this exemption at this time.

B. Exemption 7(D)

The government has withheld the names of the sources of some of the information in its files under the authority of exemption 7(D), 5 U.S.C. § 552 (b)(7)(D), which exempts from disclosure records compiled for law enforcement purposes which would disclose the identity of a confidential source. The government has presented a convincing case on the issue of the need to protect the sources of the information at issue. However, no showing has yet been made that the records were "compiled for law enforcement purposes." Therefore, the Court will deny the government's motion with respect to this exemption at this time.

III. *Plaintiff's Second Request—Reasonable Description*

Plaintiff's second request asked for all White House requests for information concerning federal elective office seekers or office holders during a six year period. According to the government, the FBI does not maintain any separate file of requests from White House staff members. Thus, Bureau personnel would be required to search every special inquiry file compiled during the six year period. The Court finds plaintiff has failed to reasonably describe the requested documents. The description provided by the plaintiff is insufficient to enable a professional employee of the agency who was familiar with the subject area to locate the record with a reasonable amount of effort. *See* 12 U.S. Code Cong. & Admin. News, pp. 6207 & 6222. (Dec. 15, 1974). Although the plaintiff has failed to adequately describe the records sought, the plaintiff was not given an op-

portunity to modify his requests. The Court finds that the plaintiff should now be given that opportunity.

ORDER

Accordingly, upon consideration of the entire record herein, it is, by the Court, this 3d day of January, 1979,

ORDERED, that defendant's motion to dismiss be, and the same hereby is, denied, and it is

FURTHER ORDERED, that plaintiff shall file a more reasonable description of the documents sought in its second request within ten (10) days of the date of this order.

/s/ Charles R. Richey
CHARLES R. RICHEY
United States District Judge

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